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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1965

**No. 700**

UNITED STATES OF AMERICA,
*Appellant,*

*vs.*

RAY S. FISHER,
*Appellee.*

*ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY*

## MOTION TO DISMISS OR AFFIRM

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## MOTION TO DISMISS OR AFFIRM

Appellee Ray S. Fisher pursuant to Rule 16 moves before this Court to dismiss the Appeal taken by appellant, United States of America, or, in the alternative, to affirm the Orders of the United States District Court for the District of New Jersey dismissing the Indictment against defendant Ray S. Fisher.

### Introductory Statement

(References are herein made as follows: "JS" refers to the Jurisdictional Statement of appellant, United States of America; "Tr" refers to the transcript of the Hearing on the Motion to Dismiss.)

The Motion to Dismiss the appeal is based upon the ground that appeal was not timely taken. The Motion to Affirm is based upon the ground that the question presented in the Jurisdictional Statement and the argument in support thereof does not raise a substantial question. Although appellee in presenting his case to this Court, if this Court were to take jurisdiction, could by brief and oral argument resist in broad detail what appellant may say, the appellant is bound by the limitations of its Jurisdictional Statement and can raise no other new points. Therefore, on this motion, our attention is directed solely to the position of the appellant as set forth in the Jurisdictional Statement. It appears from the question posed by appellant that the question raised is so unsubstantial as not to require oral argument in the Supreme Court.

## I

**The appeal has not been taken in time and should be dismissed.**

On April 29, 1964, the District Court heard argument on the Motion of defendant, Ray S. Fisher, to dismiss the Indictment as against him (Tr-1; 4/29/64). On June 23rd and June 24, 1964 the Court heard live testimony in support of defendant's Motion (Tr-1; 6/23/64).

On February 11, 1965, the Court filed its Opinion (JS-29) and on February 26, 1965, entered its Order in conformity with the Opinion (JS-29). This Order was presented to the Court by attorneys for the defendant with the consent of the United States Attorney affixed.

For some reason presently unknown to counsel, the Clerk of the United States District Court for the District of New Jersey did not perform his ministerial act of noting on the docket the entry of the Order until six days later, on March 4, 1965 (JS-1).

General Rule 10 of the Rules governing the United States District Court for the District of New Jersey provides that a Motion for re-argument shall be made within fourteen days "after the filing of the court's determination of the original Motion and upon the same notice required for the original Motion."

Whatever date we use to establish the running of the time for the rehearing, United States of America, out of time, on March 23, 1965 moved for re-argument. If the starting date is the date of the Court's Opinion, the fourteen days would have expired on February 25th. If the starting time is the date of the Order dismissing the Indictment, the fourteen days would have expired on March 12th. If the docketing date of the Order is used as the starting date, the fourteen days would have expired on March 18th. Notwithstanding the foregoing, the Court did entertain the motion for the rehearing, received briefs and heard oral argument on April 12, 1965. (We note that the Jurisdictional Statement filed by the Government states "an Order denying a petition for rehearing was entered on July 26, 1965" (JS-2). This statement is inaccurate as fully appears by the Order itself (JS-35). A more accurate description of this document is: an Order was entered, after briefs and full argument, denying the Government's Motion to set aside the Order of the Court theretofore entered dismissing the Indictment against Ray S. Fisher (JS-35 to 36).)

After receiving the briefs on the Motion for rehearing and re-argument, and having heard oral argument, the Court on July 2, 1965, rendered a formal written opinion determining that "the original Opinion and decision stand as pronounced" (JS-34). The Order was then prepared by the United States Attorney, consented to by counsel for the defendant and was thereafter signed by the trial judge

on July 21, 1965 (JS-35). Five days later, on July 26, 1965, the Clerk performed his ministerial act by noting in his docket the Order of the Court dated July 21, 1965. We do not know why it took the Clerk five days to make the notation.

The United States filed its Notice of Appeal to this Court on August 25, 1965. The time for taking an appeal to this Court is thirty days.

Rule 11(2) of this Court provides: "*An appeal permitted by law from* a District Court to this Court in a criminal case shall be in time when the Notice of Appeal prescribed by Rule 10 is filed with the Clerk of the District Court *within thirty days after entry of the judgment or order appealed from.*" The "*appeal permitted by law*", referred to in Rule 11, is provided for by the Statute as follows: "The appeal in all such cases shall be taken *within thirty days after the decision or judgment has been rendered* and shall be diligently prosecuted." (18 U. S. C. 3731) (Emphasis supplied) Does the time to appeal start to run from July 2, 1965 (the date of the formal opinion of the Court) or from July 21, 1965 (the date the Court below entered its order). In either case the Notice of Appeal filed by the United States on August 25, 1965 is out of time. In fact the copy of the Order bears the following stamp: "ORIGINAL FILED JULY 21, 1965—MICHAEL KELLER, JR., CLERK".

If argument is to be made that the Statute, 18 U. S. C. 3731, is inconsistent with Supreme Court Rule 11 and that the time begins to run from the ministerial notation of a clerk (July 25, 1965), the Rule must fall.

The appeal is perfected by filing a Notice of Appeal with the Clerk of the District Court. This time cannot be extended (Rule 45 b), Rules of Criminal Procedure). There are cases which hold that on an oral judgment or opinion,

the Clerk's docket entry on the day of the oral judgment or opinion may or may not be the date from which the appeal time starts to run. Apparently this varies from district to district and perhaps from case to case. See *U. S.* v. *Hark,* 320 U. S. 531, 64 S. Ct. 359, 88 L. Ed. 290, rehearing denied, 321 U. S. 802, 64 S. Ct. 517, 88 L. Ed. 1089. It has been held that where a Clerk or Deputy Clerk notes in his docket the oral opinion of the Court the practice in some districts has been to hold that the time starts to run from the signing of the formal order and not the earlier ministerial notation by the Clerk. Certainly the running of the time could not start with the delayed, simple ministerial act of the Clerk or Deputy Clerk days after a final order has been signed by the Judge. It is apparent that this would then leave in the hands of a Clerk or his assistant a determination of when, for his own good purpose or bad purpose, he may, by his notation, start the running of time for appeal.

We again call to the Court's attention that the latest of the two Orders presently appealed from were presented to the Court by the United States Attorney and that this Order was signed by the Judge on July 21, 1965. In fact and in law the pronouncement of the Court's judgment was the signing of the formal Order and this fixed the date from which the time for appeal ran.

The right of the Government to take the appeal in the case at bar is granted to it solely by the Statute (18 U. S. C. 3731). This Court has ruled that the Statute in question should be "narrowly and strictly construed." *U. S.* v. *Mersky,* 361 U. S. 431, 80 S. Ct. 459, 4 L. Ed. 2d 423. This right granted to the United States is an exceptional right and should be strictly limited to the precise language of the Statute which creates that right. *U. S.* v. *Keitel,* 211 U. S. 370, 29 S. Ct. 123, 53 L. Ed. 230 and *U. S.* v. *Borden Co.,* 308 U. S. 188, 60 S. Ct. 182, 84 L. Ed. 181. On rare

and exceptional occasions this Court, pursuant to its Rule 2, has extended the ten day period for a defendant who had failed to file his Notice of Appeal in due time. Such extension, however, has always been directed exclusively to a defendant and his right of appeal under the rules and has been based upon a showing of good cause, excusable neglect or "fairness". We find no case where this Court has extended, pursuant to Rule 2 or any other Rule, the statutory period as established by Congress for "appeal by United States" (18 U. S. C. 3731). In any event the Government has not shown any excusable neglect even if it were appropriate to make such a showing.

It is respectfully submitted that the appeal presently noticed by the United States of America is untimely and should be dismissed.

## II

**The question presented in the jurisdictional statement is unsubstantial.**

The United States of America in its Jurisdictional Statement (JS-6 to 9) sets forth what it considers to be facts developed by the testimony taken and the exhibits presented on the Motion to dismiss the Indictment. For the purposes of this Motion and solely for the purposes of this Motion we will accept the Government's version.

The defendant had every right to rely upon the formal compact between the Departments of Labor and Justice. There can be no doubt from what was said before the Grand Jury by the United States Attorney and the advice which was given to the defendant by his counsel, that if he testified before the Grand Jury, immunity would attach (Tr. 73 to 78). The United States of America in its brief

and in summation in resisting the Motion to Dismiss asserted the validity of the Memorandum of Understanding. It was not until after the Court ordered the dismissal of the indictment that the United States Attorney took the position on rehearing that the Memorandum of Understanding signed by the Attorney General of the United States and by the Secretary of Labor was a nullity. The United States supported its argument on the original motion to dismiss with cases which urged the validity of the Memorandum of Understanding. See *Goldberg* v. *Battles*, 196 F. Supp. 749 (E. D. Penn. 1961), affirmed 299 F. 2d 937 (3rd Cir. 1962), cert. den. 371 U. S. 817 and *In re Certain Grand Jury Witnesses*, 211 F. Supp. 365 (E. D. Mich. 1962). The Government should not be heard to take a position at this late date that a formal agreement between the Attorney General and the Secretary of Labor duly published for the information of the world, including this defendant, is a nullity. This agreement was entered into during the administration of President Eisenhower by the then Secretary of Labor, James P. Mitchell and by the then Attorney General, Wililam P. Rogers. Thereafter, the same Memorandum of Understanding was re-affirmed and made use of during the administration of President Kennedy, by the then Secretary of Labor, Arthur J. Goldberg and the then Attorney General, Robert F. Kennedy. It continues to be in force today as a compact between Secretary of Labor Wirtz and Attorney General Katzenbach. Can the Department of Justice in its present appeal by the Solicitor General be acting in good faith when it takes the position that the Secretary of Labor had no power to delegate the investigation to the Department of Justice? Are not attorneys, defendants, respondents and citizens in general entitled to rely upon the published, documented agreements between the highest officials in Government as they are set forth in the Federal Register (25 F. R.

1708) by way of notice to the world pursuant to Section 3 of the Administrative Procedures Act (5 U. S. C. 1002).

Although the Government now argues that the agreement between the Department of Justice and the Department of Labor is a nullity, there must always exist a presumption of regularity in the proceedings of public officials and especially is this so when it is one of the public officials who questions the irregularity in his own Department. The burden is upon the Government to clearly show otherwise to overcome this presumption. When the Government undertakes an obligation in broad terms on which individuals have a reasonable right to rely, the Government should not seek to have the doubts created by both the Department of Justice and the Department of Labor resolved in it own favor against the private citizen who has taken the Departments at their word. There should be no room for anyone to doubt that when the various Departments of the Government enter into contract or agreements that they will adhere strictly to terms of same. This should especially be so in a criminal matter.

Assuming *arguendo* that the Department of Justice and the Department of Labor had no authority and that their joint contractual obligation was a nullity, the immunity still must attach in this case, for if we adopt the view now taken by the Government a very serious doubt would be cast upon the traditional notions of fair play. The Government's position that immunity would attach in a hearing before the Labor Commissioner or some other administrative person such as a Hearing Officer, or a Deputy and that it would not attach when the witness appeared under Subpoena in response thereto before a Grand Jury with the United States Attorney present is somewhat ludicrous.

This Court on many occasions has urged that the prosecution be precluded from establishing a trap for the unwary and has also forbidden the prosecution from "whip saw" tactics. *Murphy* v. *Waterfront Commission*, 378 U. S. 52. To accept the Government's position in the case at bar would be to permit the United States Attorney in the formal procedure before a Grand Jury to deprive a witness of his constitutional prerogatives, notwithstanding the fact that had a lower level investigation been conducted by a lesser official than the United States Attorney immunity would automatically be conferred.

In the *Murphy* case this Court condemned the whip saw process between Federal and State Courts. Should not similar criticism be extended to the whip saw process performed by the Department of Justice in concert with the Department of Labor.

In *U. S.* v. *Pardue, et als.*, 294 F. 2nd, 543 (D. C. S. D. Tex. 1923), the Court had occasion to construe the language contained in the Federal Trade Commission immunity provision (15 U. S. C. 1949). At page 547 the Court said:

> "It by judicial interpretation writes into a statute in derogation of a constitutional right a limitation not therein contained, and which the ordinary mind, to which the statute is addressed, could not have supposed was contained in it. It to an extent follows the Draconian principle of writing the law in characters so fine that no one can read it, and thereby putting the government in a better position to take the unwary ones into its net. It magnifies the fault of the defendant, while it minimizes the bad faith of the government. It puts the seal of condemnation upon the offense against the general laws of which the defendant is charged, but it approves a

> double dealing and evasion on the part of the government in the matter of a man's constitutional protection, which right reason and sound discrimination cannot, in my opinion, sustain."

In *U. S.* v. *Monia,* 317 U. S. 424 (1943) this Court said at page 430:

> "Congress evidently intended to afford Government officials the choice of subpoenaing a witness and putting him under oath, with the knowledge that he would have complete immunity from prosecution respecting any matter substantially connected with the transactions in respect of which he testified, or retaining the right to prosecute by foregoing the opportunity to examine him."

In dealing with the Constitutional rights of a witness before a Grand Jury it is incumbent upon the United States to make sure that the traditional "fair play" doctrine as time and time again restated by this Court is carefully followed.

No substantial question having been raised by the United States of America in its Jurisdictional Statement, the Order of the Court below dismissing the Indictment should be affirmed.

## CONCLUSION

**Therefore it is respectfully submitted that the appeal should be denied or the order appealed from affirmed.**

Respectfully submitted,

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